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No. 09-1308

IN THE

Supreme Court of the United States

MARTIN MARIETTA MATERIALS, INC.
and HUNT MARTIN MATERIALS, LLC,

Petitioners,

v.

CITY OF GREENWOOD, MISSOURI,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
MISSOURI COURT OF APPEALS

REPLY BRIEF

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PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIP

The corporate disclosure statement for Petitioners Martin Marietta Materials, Inc. and Hunt Martin Materials, LLC was set forth on page ii of their Petition For a Writ of Certiorari, and there are no amendments to that statement.

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ARGUMENT

This case presents two important questions of federal law that (contrary to Greenwood's contentions) are fully preserved and properly within the jurisdiction of the Court.[1] First, the punitive damages award raises fundamental due process issues. Greenwood, a municipality, has been awarded $10 million in punitive damages punishing conduct that was found by a federal district court to be protected under the Commerce Clause, was permitted by Greenwood's own ordinance, and was authorized by a contract between Greenwood and Petitioners. The due process issues of fair notice and punishment of lawful conduct raised by this case warrant a grant of certiorari.

The importance of the second question presented on the issue of federal compulsory counterclaims is not lessened, as Greenwood claims, because it arises from a decision in state court. Indeed, such issues of federal law arise frequently in state courts, and uniformity as to the standard applied is essential to the proper functioning and cohesiveness of the dual state-federal judicial system. The conflict between the differing standards applied by the Missouri Court of Appeals and federal circuit courts merits resolution by this Court.

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[1] On May 25, 2010, the Missouri Supreme Court declined review of a related decision by the Missouri Court of Appeals, reversing the state trial court's entry of an injunction prohibiting the truck traffic at issue here. Greenwood has sought a stay of the mandate "so that [it] may file a petition for writ of certiorari" in this Court.

I. PETITIONERS' DUE PROCESS ARGUMENT WAS FULLY PRESERVED

Petitioners preserved below their due process argument that the punitive damages award impermissibly punishes lawful conduct. It is "well settled" that to preserve a constitutional issue for review by this Court, "'[n]o particular form of words or phrases is essential.'" *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74, 85 n.9 (1980) (citation omitted). All that is required is that the claim "'be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.'" *Id.* (citation omitted). Here, the record demonstrates that the Missouri trial and appellate courts had "'a fair opportunity to address the federal question[s] that [are] sought to be presented.'" *See Adams v. Robertson*, 520 U.S. 83, 87 (1997) (citation omitted).

In its brief to the Missouri Court of Appeals, Martin Marietta set forth its due process argument in a section entitled, "Punitive Damages may not be used to punish or deter lawful conduct."[2] Greenwood incorrectly asserts that Martin Marietta "did not cite the Due Process Clause" in that section "or anywhere else in its brief." Opp. 11. In fact, Martin Marietta argued that "'[a] decision to punish a tortfeasor by means of an exaction of punitive damages is an exercise of state power that must comply with the Due Process Clause of the Fourteenth Amendment,'" and that the punitive award in this case was inconsistent with "Due

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[2] Martin Marietta's Br. at 140 (Mo. Ct. App. Dec. 1, 2008). Moreover, contrary to Greenwood's contention (Opp. 8 n.7, 15), Hunt Martin expressly incorporated in its appellate brief Martin Marietta's challenge to the punitive damages award. Hunt Martin's Br. at 13 n.1 (Mo. Ct. App. Dec. 1, 2008).

Process guarantees," "betray[ed] the most basic notions of fairness and due process," and "violate[d] due process guarantees" because it punished lawful conduct.[3] Martin Marietta quoted from *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), the propositions that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort" and that "[a] State cannot punish a defendant for conduct that was lawful where it occurred."[4] Martin Marietta explained that the conduct punished was lawful because Greenwood had "designated" Second Avenue as the exclusive through-truck route, the 1991 contract between the parties gave Petitioners "express permission" to use Second Avenue, and Petitioners had the "blessing of a federal court" to continue using Second Avenue.[5]

Contrary to Greenwood's contentions, this due process argument was not merely "the discussion of 'a federal case, in the midst of an unrelated

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[3] Martin Marietta's Br. at 138, 141 & n.25, 143 (Mo. Ct. App. Dec. 1, 2008).

[4] *Id.* at 141.

[5] *Id.* at 142-43. Greenwood's argument that Martin Marietta's "Point Relied On" was deficient (Opp. 9-10) is unavailing. Missouri appellate courts do not refuse review "unless the deficiency [in a "Point Relied On" or argument] impedes disposition on the merits" — *i.e.*, the "brief ... is so deficient that it fails to give notice to th[e] [c]ourt and to the other parties as to the issue presented on appeal." *Wilkerson v. Prelutsky*, 943 S.W.2d 643, 647 (Mo. 1997); *see also Doe v. Roman Catholic Diocese*, 862 S.W.2d 338, 340-42 (Mo. 1993) (considering constitutional issue over dissenting opinion that "Point Relied On" was "woefully insufficient"). Here, Martin Marietta's "Point Relied On" expressly referenced the lawful use of Greenwood's streets, and, as shown above, its brief fully presented its due process argument. Thus, the purported deficiencies in the "Point Relied On" do not support waiver.

argument.'" Opp. 13 (quoting *Adams*, 520 U.S. at 88 (citation omitted)). Rather, Martin Marietta's due process argument was squarely presented and was more than sufficient "'to inform [the] state court'" that it was making a constitutional due process claim. *Adams*, 520 U.S. at 88 (citation omitted).[6] That the Missouri Court of Appeals did not explicitly rule on Martin Marietta's due process argument does not preclude this Court's review of those constitutional issues. *See Illinois v. Gates*, 462 U.S. 213, 218 n.1 (1983).

Petitioners also preserved their due process argument in the trial court. In their joint motion for JNOV/new trial, Petitioners argued that "[p]unitive damages are not authorized in this case because the Fourteenth Amendment prohibits punishment for the lawful use of a public road with permission and authorization to use the public road"[7] and that "the mere imposition of punitive damages for conduct submitted to a federal court and determined to be legal is unconstitutional on its face ...."[8] Petitioners' reliance on the federal constitution's "Due Process guarantees" is underscored by the section heading: "The Fourteenth Amendment Prohibits Punishment

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[6] Petitioners also preserved their due process argument in their applications for transfer to the Missouri Supreme Court. For example, Hunt Martin's application cited *Campbell* and *Gore*, arguing that the punitive award "raise[d] a serious constitutional issue" because Petitioners were "being punished ... for obeying Greenwood's designation of Second Avenue as a commercial truck route on Greenwood's Second Avenue." Hunt Martin's Transfer Application at 1, 5-6 (Mo. Oct. 6, 2009); *see also* Hunt Martin's Motion for Rehearing/Transfer Application at 2, 5 (Mo. Ct. App. Aug. 25, 2009); Martin Marietta's Transfer Application at 4 (Mo. Oct. 6, 2009).

[7] Motion for JNOV/New Trial ¶ 16 (Mo. Cir. Ct. Apr. 14, 2008).

[8] Suggestions in Support of Motion for JNOV/New Trial on Punitive Damages at 12 (Mo. Cir. Ct. Apr. 14, 2008) (citing and quoting *Campbell*, *Gore*, and *Bordenkircher*).

for the Lawful Use of a Public Road Pursuant to Express Authorization to Do So."[9]

Greenwood erroneously contends that Petitioners waived the due process argument by not raising it in their motion for directed verdict. Opp. 7-8. Missouri procedural law does not require that all arguments be raised in a directed verdict motion to preserve them for appellate review. Directed verdict motions address the sufficiency of the evidence. *See, e.g., Fleshner v. Pepose Vision Inst., P.C.*, 304 S.W.3d 81, 95 (Mo. 2010). Petitioners' argument that due process prohibits punishment of their lawful conduct raised a legal, constitutional question and did not go to sufficiency of the evidence. Such a question was not required to be included in a directed verdict motion but was properly preserved in Petitioners' motion for a new trial. *See, e.g., Call v. Heard*, 925 S.W.2d 840, 847 (Mo. 1996) (federal due process challenge to punitive damages award preserved when raised for first time in motion for new trial).[10]

In sum, Petitioners' argument that the punitive damages award contravened due process because it punished lawful conduct was preserved at every stage of this litigation.

II. THE PUNITIVE DAMAGES AWARD UNCONSTITUTIONALLY PUNISHES LAWFUL CONDUCT

Petitioners were punished for the same conduct that the federal district court held was protected by

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9 *Id.* at 11-12.

10 In arguing waiver, Greenwood glides over the fact that Petitioners moved for a new trial. Greenwood cites no authority that an issue properly raised on a motion for new trial (as the due process issue of punishing lawful conduct was in this case) must also have been raised in a directed verdict motion.

the Commerce Clause, was the subject of a valid contract between Petitioners and Greenwood, and complied with Greenwood's designation of Second Avenue as the sole truck route through the city to and from Petitioners' quarry. Pet. 14-19. These factual circumstances distinguish this case from the nuisance cases cited by Greenwood and render the punitive award impermissible.

In arguing that punitive damages were constitutionally permissible and that Petitioners' conduct was not lawful, Greenwood incorrectly claims that Petitioners "conflate" the federal court litigation with the state court litigation and that the 1991 contract and Commerce Clause were not part of the state litigation. Opp. 15-16. In fact, the Missouri trial court admitted evidence of these matters for purposes of appeal. The trial judge kept this evidence from the jury because he felt he had "stunk this thing up with the federal proceedings enough."[11] Thus, the federal court's preliminary injunction order (which discussed the 1991 contract and Commerce Clause), federal court transcripts on Petitioners' motion for a preliminary injunction, and Petitioners' federal court complaints were all admitted for purposes of the appeal, with Greenwood's counsel's acquiescence, provided that they not go to the jury.[12] These documents fully support the argument, made in Petitioners' briefing to the Missouri Court of Appeals, that Petitioners had been punished for a "plainly lawful course of conduct, in which trucks used Second Avenue with Greenwood's express permission from 1991 to 2006, and with the blessing of a federal court after that."[13]

Greenwood attempts to recharacterize the truck traffic at issue as unlawful based on the incorrect assertion that the conduct contemplated in the 1991

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11 Vol. II Trial Tr. at 1760-61 (Mar. 12, 2008).

12 *Id.* at 1761.

13 Martin Marietta's Br. at 143 (Mo. Ct. App. Dec. 1, 2008).

contract, authorized under the federal court's preliminary injunction and under Greenwood's former ordinance, was "at most, the mere presence of trucks on Second Avenue" or truck traffic "in the abstract," as distinguished from "how the trucks drove and the severe impact they had on Greenwood."[14] Opp. 2, 23. Contrary to Greenwood's contentions, the "presence" of trucks necessarily carries an "impact," and when Greenwood entered the contract and when it designated Second Avenue for truck traffic, heavy quarry-customer trucks, filled with crushed rock, had been traversing Greenwood's roads for decades.

Moreover, when the federal district court held that Petitioners' conduct was protected by the Commerce Clause and contemplated under the contract, it had before it all of Greenwood's assertions as to the nature of the truck traffic at issue, including the dust and noise and the size, weight, and number of the trucks.[15] Pet. 2, 6-8. In its Commerce Clause balancing, the district court weighed these asserted harms to Greenwood. Thus, the asserted "deleterious impact" of the truck traffic, which is the basis of Greenwood's nuisance claim, was known to the federal district court, and does not render Petitioners' conduct unlawful or negate Petitioners' reasonable belief that their conduct was lawful.

In short, Greenwood sought and obtained a crushing punitive damages award for conduct that complied with its ordinance, was the subject of a

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[14] Furthermore, under the former ordinance, the quarry-customer truck traffic was not a "pig in a parlor" as Greenwood claims (Opp. 21), but was precisely where it was supposed to be — on the sole route designated by Greenwood for such traffic.

[15] *See, e.g.*, Pet. 43a (noting "[a]pproximately 600 trucks a day, a truck a minute, utilize Second Avenue. City of Greenwood is not a large city thus making the truck presence even more acute"); Greenwood's Br. at 14-16 (8th Cir. Apr. 1, 2009).

contract between it and Petitioners, and had been adjudged by the federal district court and the Eighth Circuit to be entitled under the Commerce Clause to the protection of a preliminary injunction, which was issued months before the state court trial. The imposition of punitive damages for such conduct is arbitrary, oppressive, and in violation of fundamental constitutional requirements of fair notice and due process.

III. THIS COURT SHOULD GRANT REVIEW TO RESOLVE CONFLICTS AS TO THE FEDERAL LAW STANDARD GOVERNING COMPULSORY COUNTERCLAIMS

According to Greenwood, this Court lacks jurisdiction to review the Missouri Court of Appeals' determination as to whether Greenwood's claims were federal compulsory counterclaims. Opp. 27-28. Greenwood's narrow view of this Court's jurisdiction is contrary to the broad wording of Section 1257(a), which endows this Court with jurisdiction to review a state court case "where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States." 28 U.S.C. § 1257(a). Under Section 1257(a), the Court "possess[es] jurisdiction to review state court determinations that rest upon federal law." *Oregon v. Guzek*, 546 U.S. 517, 521 (2006). *See also* Eugene Gressman et al., *Supreme Court Practice* 151 (9th ed. 2007) (Section 1257(a) "covers the entire range of federal questions that can arise in a case in a state court"). Greenwood cites no judicial decision holding that issues regarding the Federal Rules of Civil Procedure are not within this Court's jurisdiction.

The Federal Rules of Civil Procedure are promulgated by this Court under authority exercised under the Rules Enabling Act. *Shady Grove*

Orthopedic Assocs., P.A. v. Allstate Ins. Co., 130 S. Ct. 1431, 1442 (2010). Petitioners' invocation of Rule 13(a) was "specially set up or claimed" under that exercise of authority. Under Section 1257(a), this Court plainly possesses jurisdiction to review the Missouri Court of Appeals' determination on the compulsory federal counterclaim issue. *Cf. Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525 (1986).

Moreover, the Missouri court's holding presents an important issue of federal law that merits review by this Court. Rule 13(a) promotes the efficient, fair functioning and cohesiveness of the federal-state judicial system. *Cf. Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 591 A.2d 592, 598 (1991). It also furthers the jurisdiction of the federal district courts to decide an entire case or controversy, *see* U.S. Const. art. III, § 2; 28 U.S.C. § 1367(a), and the ability of a plaintiff in federal court to obtain effective resolution of his claims. The importance of this issue is not diminished because it arose in a state court. State courts frequently have occasion to address Rule 13(a) in determining the effect of a federal court judgment — an issue to which they must apply federal law. *See, e.g., Nottingham v. Weld*, 377 S.E.2d 621, 623 (Va. 1989) (citing cases). This case illustrates the harmful effect when a state court proceeds to trial and judgment on claims that should have been brought as federal counterclaims. The state court judgment collides directly with the federal district court's prior preliminary injunction, effectively prohibiting on pain of further punitive and compensatory damages the use of Second Avenue that the federal district court found to be protected under the Commerce Clause and under the contract between the parties.[16]

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[16] A preliminary injunction has been held to be a "judgment" for purposes of the Federal Rules of Civil Procedure and the relitigation exception to the Anti-Injunction Act. *See, e.g., NBA v. Minn. Prof'l Basketball*, 56 F.3d 866, 871-72 (8th Cir. 1995).

Greenwood incorrectly claims that Petitioners ask this Court to "address 'the misapplication of a properly stated rule of law.'" Opp. 29. To the contrary, the Missouri Court of Appeals applied legal criteria that are incorrect and that conflict with the legal standards articulated by the United States Courts of Appeals under Rule 13(a). The Missouri Court of Appeals erroneously looked to whether Greenwood's tort claims were based on the same legal theories and raised the same legal issues as Petitioners' claims before the federal district court. *See* Pet. 27-28. Most United States Courts of Appeals have held that the application of the compulsory counterclaim rule rests upon a shared *factual* nucleus, not common *legal* issues. *See, e.g.*, *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1196 (9th Cir. 2005) (examining whether "the counterclaim arises from the same aggregate set of operative facts as the initial claim" (citation omitted)); Pet. 27-28 (citing cases); *but see Burlington N. R.R. Co. v. Strong*, 907 F.2d 707, 711 (7th Cir. 1990). Here, the aggregate core of facts upon which Petitioners' federal court claims rested is precisely the core of facts from which Greenwood's nuisance claim arose. *See* Pet. 26-29. Indeed, Greenwood itself notes the "factual interrelatedness between the two cases." Opp. 31.

The cases cited by Greenwood do not support the Missouri Court of Appeals' determination that Greenwood's claims were not federal compulsory counterclaims. *Exxon Mobil Corp. v. Saudi Basic Industries Corp.*, 544 U.S. 280 (2005), and *Parsons Steel*, unlike this case, involved prior-filed state court claims and thus do not implicate Rule 13(a). *See* Fed. R. Civ. P. 13(a)(2)(A). *Atlantic Coast Line Railroad Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281 (1970), *Kline v. Burke Construction Co.*, 260 U.S. 226 (1922), and *McClellan v. Carland*, 217 U.S. 268 (1910), do not address compulsory counterclaims, but merely stand for the principle that a federal court generally may not enjoin a parallel state action.

Accordingly, this Court should grant certiorari to clarify the proper legal standard and analysis under Rule 13(a).

CONCLUSION

The Petition should be granted.

Respectfully Submitted,

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